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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VINCENT FRANK PEDERSEN, Defendant and Appellant.	D073467 (Super. Ct. No. SCE365343)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed.

David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Chartier had a reputation as a bully who harassed, threatened, and intimidated his neighbors, including defendant Vincent Pedersen. After a brief confrontation, Pedersen fatally shot Chartier in front of Chartier's residence.

These basic facts were undisputed at trial. What was disputed was Pederson's legal responsibility for the killing. Was Pedersen guilty of first degree murder, second degree murder, or voluntary manslaughter based on reasonable provocation or imperfect self-defense? Or was Pederson not guilty of any crime based on self-defense? The jury decided the prosecution proved second degree murder. The court imposed a sentence of 15 years to life, plus 10 years for a firearm use enhancement.

On appeal, Pederson contends the court committed instructional errors. The errors pertain to the court's giving: (1) a trespass instruction (CALCRIM No. 3475); (2) instructions relating to a defendant's self-defense rights during or arising from a fight (CALCRIM Nos. 3471, 3472); and (3) instructions relating to the mental state necessary for voluntary manslaughter (CALCRIM Nos. 570, 571, 252). We determine there was no prejudicial error and affirm.

FACTUAL SUMMARY

We summarize the facts and arguments presented at trial. We describe additional evidence and arguments when discussing the particular legal issues.

Prosecution Case

Both Chartier and Pederson were methamphetamine users, as were most of the trial witnesses (except for the law enforcement witnesses). Chartier lived in a trailer on

residential property owned or leased by Michael H. Pederson lived nearby in a small building behind his father's house.

Chartier, known as Little Ricky, had a reputation in the neighborhood for being violent and abusive, and almost always carried some type of weapon, such as a sword, machete, or knife. He had numerous tattoos, including large swastikas on his back and neck. He would ride a bicycle around the neighborhood carrying a sword attached to his belt. His actions were erratic and many people were afraid of him.

In September 2016, Pederson and his friend Erik were at a neighbor's home. Chartier, who was also Erik's friend, walked into the home holding a long spear over his head, and yelled at Pedersen, saying he had heard Pederson had accused him of stealing Pedersen's motorized bicycle. Chartier threatened to kill Pedersen and his dog. Chartier said he knew that Pedersen had previously suffered a head injury and if Pedersen was punched in the head, it would kill him. A loud argument ensued. Some neighbors heard the shouting and called the police.

Soon after the incident, on September 28, Pedersen sent a text message to his girlfriend Jennifer, stating "this time I ain't bringing my fist to a knife fight. I ain't stupid enough to . . . ." Shortly after, Jennifer texted him to be careful because she had been listening to the "scanner" and "there are [c]ops all over." Pedersen replied: "It would be premeditated if I went to get my stuff back. If he confronts when I am packing my things from there, I handle it. But I am not going to go looking to the boy down [*sic*]." Pedersen then texted that Chartier had taken his bike "for the ninth time now." Pedersen

said he had come up with "a diabolical plan" of "REVENGE AND JUSTICE." He asked Jennifer to procure "half a case of spray paint" for him.

Pedersen later went to numerous nearby locations and spray painted a picture of a rat with Chartier's nickname underneath the paint. Pedersen said his "diabolical plan" text references pertained to this spray painting.

In late October 2016, Chartier came to Pedersen's yard sale. Chartier was armed with a sword, and his head was bleeding. Chartier had an "attitude" and exchanged words with Pedersen.

On November 4, about five weeks after their first argument, Pedersen fatally shot Chartier. On the day of the shooting, Pedersen learned that another one of his bicycles had been stolen, and someone told him Chartier had taken the bicycle. Pedersen was upset about this.

Pederson and another man (apparently Pedersen's father) then drove to Michael's house at the property where Chartier was staying. Michael was in front of the house. The two men asked Michael if Chartier was there. Michael said he did not know. The men said something about a bike, and one of them added, " 'Tell him to stay away from my house.' " Michael responded that if the men had anything to say to Chartier, they should talk to him directly.

Pedersen's girlfriend, Jennifer, later came to Michael's house in her vehicle. Jennifer appeared upset and angry and asked Michael if Chartier was home. Michael said he did not know. Jennifer said that Chartier should stay away from the "house" and

"demanded" he give the bike back. Michael told Jennifer she would need to discuss the matter with Chartier.

As Jennifer drove away, Chartier's girlfriend, Kelly, was walking to Chartier's house to meet up with him. Earlier that day, Kelly had received a text message from Pedersen saying Kelly was no longer welcome at his home because she was "guilty by association." Kelly walked up to Jennifer's car to ask her why Pedersen sent the message, and Jennifer said, " 'Tell [Chartier] to bring the fucking bike back.' " At that point, Chartier came walking down the street, and Jennifer and Chartier began screaming at each other. Chartier hit Jennifer's car hard with a stick and told her to leave before he hit her car again. As Jennifer was leaving, Chartier again banged on her car with the stick.

Jennifer was frantic and upset. She drove to Pedersen's home, but he was not there. Pedersen's friend Erik was at the home. Jennifer and Erik then went to find Pedersen, who was at another friend's house in the neighborhood. A woman who was with Pedersen saw the handle of a handgun protruding from the back of Pedersen's pants.

When Jennifer and Erik arrived, they told Pedersen about Chartier's hitting Jennifer's car with a stick. Jennifer then drove Pedersen and Erik to Chartier's house. On the way, Pedersen was upset and angry. Jennifer parked her car partially on Chartier's property. Pedersen got out of the car, and yelled, "Where is Little Ricky? Where the fuck is he at?" Michael and Chartier came outside.

As discussed in more detail below, Michael's property has a chain-link fence around the home and front yard, with a gate on the side of the fence. Chartier walked toward the side gate waving his hands and holding a wooden object shaped like a

baseball bat. As Chartier approached, Pedersen stood on the other side of the fence and pulled out his gun and aimed it at Chartier in a "shooter stance." Pedersen told him to stop coming to his home. Chartier said, "What are you going to do, shoot me" or "Go ahead and shoot me." Chartier then threw the club in Pedersen's direction (it did not hit him) and hopped over the fence.

Pedersen backed up as Chartier was coming toward him. Pedersen continued to point the gun at Chartier and yell at Chartier to stay away from his house. Chartier again said, "go ahead and shoot me," while waving his hands in the air. Pederson then fired a single shot which hit Chartier in the abdomen area. Pedersen got back into Jennifer's car and Jennifer drove away. Chartier died from the gunshot wound.

Defense Case

Pederson testified in his own defense. He said he had no intention of killing Chartier and just wanted him to "leave me alone." He said Chartier had threatened his life on multiple occasions. After they argued in September 2016, Chartier would stand outside Pedersen's house on a daily basis, yelling and screaming and making threats against him and his family.

On the day of the killing, Chartier again came to Pedersen's house to threaten him. Pedersen's father later drove him to Chartier's house to tell Chartier to " 'knock this shit off.' " Pedersen went home, got a gun, and put it under his pillow. Later that evening, Pedersen went around the block to visit a neighbor. Because he was afraid Chartier might be out in the bushes, he put the gun in his waistband.

After he had been at his friend's house for some period, Erik came running in the house telling him that Chartier had just attacked Jennifer, who was outside in her vehicle, "blubbering and real hysterical." Pedersen and Erik ran outside and got into Jennifer's car, and Jennifer drove to Chartier's home.

Pedersen said that when they arrived at Chartier's home, he got out of the car and asked Kelly, " 'Where is Little Ricky?' " As he was walking on the dirt area of the driveway outside the fence, Pedersen saw Chartier coming toward him with the wooden club in his hand. When Chartier started coming faster holding the club, Pedersen pulled out his gun, and Chartier said, "Oh, you brought a gun to my house." Pedersen yelled for Chartier not to come to his house again. But Chartier kept coming toward the fence, yelling, "shoot me," and then jumped the fence and continued to come after Pedersen. At that point, Pedersen held the gun out and looked down, and did not see that Chartier had thrown the club. As Chartier continued to charge toward him, Pedersen started backing up and then pulled the trigger as a "warning shot." He did not want to kill Chartier, but believed Chartier was going to kill him.

Pedersen's counsel elicited testimony from the prosecution witnesses and several defense witnesses confirming Chartier's reputation for violence and aggression. A law enforcement officer testified that in July 2015, he saw Chartier standing near a stop sign with a 20-inch machete. Other witnesses described that Chartier frequently carried weapons, including the machete, a long sword, and knives. Several witnesses also testified about Pedersen's reputation for his peaceful and easygoing nature.

Closing Arguments

The prosecutor urged the jury to find first degree murder on a premeditation theory, asserting that Pedersen had been planning the murder for five weeks since the September 2016 argument when Chartier threatened to kill him and his dog. He argued that Pedersen's planning and deliberation were shown by his September 28 text messages (referring to "a diabolical plan" of "revenge and justice") and Pedersen's carrying a loaded gun to confront Chartier. The prosecutor suggested that Pedersen went to Chartier's home knowing Chartier would come after him and thus justify Pedersen's use of force as self-defense. The prosecutor also argued that Pedersen was not acting rashly or emotionally when he shot Chartier, as he testified he was calm when Jennifer drove him to Chartier's home.

With respect to Pedersen's self-defense claims, the prosecutor discussed Pedersen's testimony supporting that he saw Chartier was not holding anything in his hand immediately before Pedersen shot him, and thus argued that Pedersen was aware Chartier was no longer a threat to him. The prosecutor also asserted Pederson's self-defense claims were legally unsupported based on the court's trespass instruction and the instructions pertaining to self-defense in the context of a fight (these instructions and arguments are discussed in more detail below).

In defense counsel's closing argument, he asserted Chartier's actions immediately before the shooting put Pedersen in fear of his life, particularly based on Chartier's past threats to kill him. He argued Pedersen confronted Chartier solely to tell him to stop threatening him and his girlfriend, but after Chartier chased him with the wooden object,

Pedersen reasonably believed he was in imminent danger of being killed or suffering great bodily injury.

Jury Verdict

The jury was instructed on first and second degree murder, voluntary manslaughter, imperfect self-defense, and complete self-defense. After deliberating for about two days, the jury returned a verdict of second degree murder and found true that Pedersen intentionally used a firearm.

DISCUSSION

I. *Summary of Legal Principles Applicable to Murder, Manslaughter, and Self-defense*

Pedersen challenges five separate jury instructions. The first three instructions relate to his self-defense theories. The latter two concern the mental state required for voluntary manslaughter.

Before addressing the specific challenged instructions, it is helpful to summarize certain relevant legal principles of murder, voluntary manslaughter, self-defense, and imperfect self-defense.

First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). (*Ibid.*) Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation. (*Ibid.*) Premeditation and deliberation can be negated by provocation. (*People v. Carasi* (2008)

44 Cal.4th 1263, 1306; see *People v. Jones* (2014) 223 Cal.App.4th 995, 1000-1001.) The court instructed the jury on these principles. (See CALCRIM Nos. 520, 521, 522.)

Even when a defendant has the intent to kill, a murder can be reduced to voluntary manslaughter in limited, explicitly defined circumstances that are viewed as negating malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549; *People v. Lasko* (2000) 23 Cal.4th 101, 107-109 (*Lasko*).) For voluntary manslaughter, malice is deemed to be negated by the defendant's (1) heat of passion arising from provocation that would cause a reasonable person to react with deadly passion, or (2) unreasonable but good faith belief in the need to act in self-defense (imperfect self-defense). (*Lasko*, at pp. 107-108.) The court instructed the jury on these principles. (See CALCRIM Nos. 570, 571.)

The prosecution has the burden to disprove beyond a reasonable doubt claims of imperfect self-defense and complete self-defense. (*People v. Rios* (2000) 23 Cal.4th 450, 461-462; *People v. Lee* (2005) 131 Cal.App.4th 1413, 1429.) On imperfect self-defense, " '[a]n honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury' " negates malice aforethought. (*People v. Rogers* (2006) 39 Cal.4th 826, 883; *In re Christian S.* (1994) 7 Cal.4th 768, 773.) The jury was instructed on this principle, and was told it was entitled to consider "all the circumstances as they were known and appeared to the defendant," including Chartier's prior threats.[1] (See CALCRIM No. 571.)

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1 The given imperfect self-defense instruction stated: "A killing that would otherwise be murder is reduced to Voluntary Manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] If you conclude the defendant

On complete self-defense, a killing is justified if the defendant believes he is in imminent danger and needs to use deadly force to prevent that danger; these beliefs were objectively reasonable; and the defendant used no more force than was reasonably necessary. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The court instructed the jury on these principles. (See CALCRIM No. 505.)[2]

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acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense if: [¶] 1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] A danger is ***imminent*** if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. . . . [¶] Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force. [¶] If you find that . . . [Chartier] threatened or harmed the defendant or others in the past, you may consider that information in evaluating the defendant's beliefs. [¶] If you find that the defendant knew that . . . Chartier had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder."

2 The given self-defense instruction read in part: "The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant

II. *Claimed Instructional Errors Pertaining to Self-defense and Imperfect Self-defense*

Pedersen contends the court gave three instructions that communicated incorrect legal principles and confused the jury regarding the applicability of self-defense and imperfect self-defense theories. One of these instructions pertained to trespass and the other two pertained to a defendant's participation in a fight.

A. *Trespass Instruction*

Pedersen's main appellate argument is that the court erred in giving a trespass instruction. He argues there was no factual ground for the instruction, and based on the instructional language and the prosecutor's arguments about this instruction, it is reasonably probable the jury would have decided differently on the applicability of Pedersen's theories of complete or imperfect self-defense.

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is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. . . . [¶] . . . [¶] If you find that Richard Chartier threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. [¶] If you find that the defendant knew that Richard Chartier had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person. [¶] . . . [¶] A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of great bodily injury has passed. This is so even if safety could have been achieved by retreating."

1. *Background*

Before trial, the prosecutor said he would be requesting the CALCRIM trespass instruction that sets forth rules for evaluating an owner or occupier's use of force to eject a trespasser from his or her property after the trespasser has been told to leave. (CALCRIM No. 3475.) Defense counsel objected, arguing there was no evidence Pedersen trespassed on Chartier's property. Defense counsel noted Pedersen "never made any attempt to enter into the 5-foot chain-link fence . . . . They pull up in the driveway, this gravel dirt area, and [Pedersen] is just standing there, and the victim comes charging out of the back." The court responded, "[t]hat is your case for self-defense" and it intended to instruct on the law as to "every possible situation." The court said it would make clear to the jury that some instructions may not apply to the factual circumstances.

During later jury instruction conferences, the court said it intended to give the following instruction that was a modified version of the CALCRIM No. 3475 trespass instruction:

> "The lawful occupant of [a] property may request that a trespasser leave the property. If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to the property or the occupants, the lawful occupant may use reasonable force to make the trespasser leave.
>
> "***Reasonable force*** means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave.
>
> "If the trespasser resists, the lawful occupant may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property.

> "When deciding whether the lawful occupant used reasonable force, consider all the circumstances as they were known to and appeared to the lawful occupant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the lawful occupant's beliefs were reasonable, the danger does not need to have actually existed.
>
> "If the lawful occupant used force to defend himself or his property, you must decide what amount of force he used and whether or not that amount of force was reasonable under the circumstances. You must also decide what amount of force the defendant used and whether that amount of force the defendant used was justified as self-defense or imperfect self-defense as set forth in CALCRIM No. 505. ***Justifiable Homicide: Self-Defense,*** and CALCRIM No. 571, ***Voluntary Manslaughter: Imperfect Self-Defense-- Lesser Included Offense.***"

The prosecutor objected to the last paragraph (which is not part of the CALCRIM No. 3475 instruction), arguing the court should replace it with a statement contained in the "Related Issues" portion of the pattern instruction, which provides in part: "If the victim had a right to use force to defend himself in his home, then defendant had *no* right of self-defense, imperfect or otherwise," quoting *People v. Watie* (2002) 100 Cal.App.4th 866, 878. (Italics added.) The court rejected the prosecutor's argument, noting it had devoted time to crafting the trespass instruction to ensure it correctly stated the law as applied to the facts of the case. The court stated that under the modified instruction, even if Pedersen was a trespasser, he was still entitled to claim complete self-defense or imperfect self-defense, "depending on the amount of force [used] et cetera."

Defense counsel then reasserted his objection to the "entire instruction," claiming it was inapplicable. The court overruled the objection, observing that the evidence

showed that although Pedersen was "not inside the fence," he was on [Chartier's] property" and Chartier was asking him "in a rude way, to leave."

In instructing the jury, the court gave the modified CALCRIM No. 3475 instruction, using the language quoted above.

During closing arguments, the prosecutor referred to this instruction when arguing that it had met its burden to negate Pedersen's self-defense theories. The prosecutor asserted that "without a doubt" the area where Pedersen was standing "was [Michael's] property," noting that Pedersen stood close to where a parked vehicle was in the driveway. The prosecutor also claimed that Kelly (Chartier's girlfriend) testified she heard Michael say to Pedersen: "Get out of here. Lose the gun and leave." The prosecutor observed that Michael did not "remember saying it but [Kelly] does." The prosecutor also argued that although Chartier did not ask him " 'politely to leave' " the property, "[h]e does not have to. He does not have to say the magic words. His conduct, his actions can impart to the trespasser, 'get off my land.' [¶] . . . [¶] We don't even need that, because we know from Kelly . . . [Michael] told him, 'get off my land. Get out of here. Take your gun and hit it.' "

Defense counsel did not object to these statements, but in his closing argument he asserted the trespass instruction was inapplicable because there was no evidence anyone requested Pedersen to leave the property and that even if there was such a request, it would be "absurd" to conclude he would not retain a self-defense right if his life was in danger while on the property.

During his rebuttal argument, the prosecutor again claimed that Michael told Pedersen to " 'beat it,' " when Pedersen showed up with the gun. Defense counsel objected that this statement "misstates his testimony," but the court overruled the objection.

2. *Analysis*

Pedersen contends the court erred in giving the trespass instruction because it was factually inapplicable and barred the jury from considering his self-defense theories.

The given trespass instruction was derived from Civil Code section 50 which states: "Any necessary force may be used to protect from wrongful injury the person or property of oneself . . . ." (See CALCRIM No. 3475, Authority.) Consistent with this law, the instruction explained that a property owner has certain rights to use reasonable force to eject a trespasser who has been asked to leave the premises. Although these principles apply primarily to cases in which the owner or occupant of property is charged with using excessive force to remove a trespasser (See *People v. Corlett* (1944) 67 Cal.App.2d 33, 39-41), this instruction has also been used in situations where a trespasser is the defendant in the case (see *People v. Johnson* (2009) 180 Cal.App.4th 702, 709-710).

Pedersen does not challenge that the given instruction correctly states the law applicable to force that can be used by a property owner or occupier toward a trespasser, and can apply in cases where the trespasser is charged with a crime and asserts a defense based on the property owner's use of excessive force. But he argues the court erred in

giving this instruction because there was no evidence he was a trespasser or was asked to leave the property.

It is error to give an instruction that correctly states the law but has no application to the facts of the case. (See *People v. Debose* (2014) 59 Cal.4th 177, 205; *People v. Cross* (2008) 45 Cal.4th 58, 67 (*Cross*); *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The test is whether the instruction is "supported by substantial evidence, that is, evidence sufficient to deserve jury consideration." (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40); accord *People v. Williams* (2015) 61 Cal.4th 1244, 1263.)

Under this standard, there was no error in giving the instruction. Although the supporting evidence was thin, there was sufficient evidence from which a jury could find Pedersen was a trespasser who was asked to leave the property before he shot and killed Chartier.

The evidence established Chartier was living on property owned or leased by Michael and/or by Michael's girlfriend. As shown on trial exhibits 5 and 15 (attached to this opinion), Michael's home and front yard are enclosed with a chain-link fence. There is landscaping within the fence. Outside the fence is mostly dirt, but there is also some landscaping. There is a sign in the landscaped area outside the fenced area stating "NO PARKING USPS ONLY. ALL OTHERS WILL BE TOWED." The driveway on the left side of the front yard (when facing the house) consists of artificial green turf on one side and dirt on the other. At the time of the shooting, there was a utility trailer parked on the left side of the driveway. The home is on a street without a sidewalk, and there is a

dirt area that borders the street. But there is a clear demarcation between the street and the dirt.

The evidence showed that minutes before the shooting, Pedersen's girlfriend drove Pedersen and Erik to this property. She parked partially on the dirt area near the driveway where two other vehicles were parked. After Pedersen got out of the car, he stood close to the chain-link fence and yelled for Chartier to come out and—using expletives—demanded that Chartier stop coming to his (Pedersen's) home. After making these statements, Pedersen walked sideways parallel to the property onto the dirt portion of the driveway near the "tongue" of the trailer shown on trial exhibit 3, attached to this opinion. Although Pedersen did not enter or attempt to enter the home or the gated front yard, Pedersen was on the dirt portion of the driveway when he fatally shot Chartier.

On this record, there was sufficient evidence that Pedersen was a trespasser on the property where Chartier was living. Although the prosecution did not present any independent evidence of the property boundaries, the witness testimony together with a commonsense evaluation of the photographs support a finding that the area near the front fence where Pedersen first approached, and the dirt portion of the driveway where Pedersen stood when he shot Chartier, were owned (or leased) by Michael (or his girlfriend), with whom Chartier lived.

In challenging this finding, Pedersen argues that Chartier did not have a reasonable expectation of privacy in the area where Pedersen was standing because members of the public used the dirt area for a "public thoroughfare." The argument is factually unsupported. There was no evidence the public used this portion of Michael's

property to walk down the street. Moreover, this assertion is inconsistent with the sign on the fence prohibiting any parking in the dirt area except for post office vehicles. Further, even assuming there was some evidence showing that third parties walked on this portion of the property, this does not mean Pedersen had consent to be there. It was the jury's task to decide if the instruction applied to the factual circumstances.

Additionally, Pedersen's focus on the expectation-of-privacy concept is misplaced. There is no legal authority that a homeowner's rights to use reasonable force to eject a trespasser for purposes of Civil Code section 50 depends on whether the property owner had a reasonable expectation of privacy. Pedersen relies on decisions that are inapposite. For example, Pedersen cites *People v. Brown* (1992) 6 Cal.App.4th 1489, in which the court interpreted Penal Code section 198.5 ("the Home Protection Bill of Rights"), which imposes certain presumptions applicable to an occupant's use of force against third parties who "unlawfully and forcibly *enters [a] residence*." (Pen. Code, § 198.5, italics added.) The *Brown* court adopted the "reasonable expectation test" (*Brown*, at p. 1496) to determine whether entry onto a porch constituted "entry *into a residence* as required under section 198.5." (*Id.* at pp. 1491, 1494-1496, italics added.) The trespass instruction here did not depend on the definition of a residence, and instead applies when a third party has trespassed onto property (not limited to a residential building). (See Civ. Code, § 50; *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727-730 [trespasser in yard outside home].)

We reject Pederson's related argument that the court erred in failing to sua sponte instruct on the trespass definition contained in CALCRIM No. 2932. The CALCRIM

No. 2932 instruction applies when a defendant is charged with violating Penal Code section 602.5, which makes it a misdemeanor to enter into "any noncommercial dwelling[,] house, apartment, or other residential place" without consent. This limited definition of trespass would not apply in this situation. A "trespasser" in the context of evaluating an owner's rights to use reasonable force to remove that person from the property concerns the commonly understood definition of the term: a person who has unlawfully entered onto another person's property without consent. (See Merriam-Webster Dict. Online (2019) <https://www.merriam-webster.com/dictionary/trespasser> [as of Apr. 17, 2019], archived at <https://perma.cc/TJM9-5YT9>.) A court has no sua sponte duty to define words that do not have a technical meaning. (*People v. Rodriguez* (2002) 28 Cal.4th 543, 546-547.) We assume the jury understood it was to apply this plain-meaning trespass definition based on the court's instruction that "Words and phrases not specifically defined in these instructions are to be applied using their ordinary everyday meanings."

Pederson additionally contends the trespass instruction was factually inapplicable because he was never told to leave the property before he shot Chartier. Although it is true there was no evidence anyone explicitly ordered him off the property, there was at least some evidence supporting that he was implicitly told to leave the property. In his testimony, Michael said he did not remember saying anything to Pedersen. However, Erik, who was sitting in the backseat of Jennifer's car during the incident and witnessed the shooting, testified that he heard Michael telling Pedersen to "get rid of the gun. We don't need the gun." The evidence also showed that Chartier was holding and waving the

wooden club and threw the object toward Pedersen, before jumping over the fence and chasing Pedersen. A jury could infer from Michael's statements to get rid of the gun and Chartier's actions chasing him away that they were communicating to Pedersen that he should leave the property at once. Although the jury could have declined to credit this evidence and reject the inference, the issue is whether there was some evidence to support the giving of the instruction. There was.

In this connection, Pedersen argues the prosecutor and the court made statements that did not accurately reflect the record. Pedersen focuses primarily on the prosecutor's statements during closing arguments that witness Kelly testified she heard Michael tell Pedersen to get off his property. We agree these statements were not factually supported (Kelly testified she did not recall seeing Michael during the incident). However, the court instructed the jury: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." The court also instructed the jury it was limited to considering the " 'Evidence,' " and that "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." The court repeated this admonition immediately before the prosecutor's closing argument, stating: "Remember that the arguments of counsel are not evidence. If either attorney misstates the evidence or the law, you will rely on the evidence presented in the trial and law as stated by me."

Given these explicit directions and absent any facts to the contrary, we are required to presume the jury followed the court's admonitions and disregarded the

prosecutor's unsupported statements. (See *People v. Gray* (2005) 37 Cal.4th 168, 217.) Additionally, Pedersen objected to only one of the prosecutor's statements pertaining to Kelly's testimony (made during the rebuttal argument), and we are satisfied that in light of the clear instructions that the jurors must rely on their own recall of the evidence, the jury would not have understood the court's overruling of this objection to mean the jury was required to accept the prosecutor's unsupported characterization of Kelly's testimony. In his brief, Pedersen quotes the court's observation that Chartier " 'came after [Pedersen] with a stick and said, "get off my property," or words to that effect.' " However, the court made this statement outside the presence of the jury and therefore it could not have created any jury confusion.

Finally, any error in giving the trespass instruction was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*).)[3] As Pedersen acknowledges, giving an irrelevant or inapplicable instruction is generally "only a technical error which does not constitute ground for reversal." (*Cross, supra*, 45 Cal.4th at p. 67.) This is because we are required to assume the jury disregarded factually inapplicable instructions. The jury here was specifically told that "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. *After* you have decided what

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3 The giving of a factually inapplicable instruction is generally subject to *Watson* harmless error review. (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1247; see *Guiton, supra,* 4 Cal.4th at p. 1129.) Under this standard, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result had the instruction not been given. (*People v. Gamache* (2010) 48 Cal.4th 347, 376.)

the facts are, follow the instructions that do apply to the facts as you find them." (Italics added.) Based on these instructions, if Pedersen is correct that there were no supporting facts to show a trespass or that he was told to leave the property, the jury would not have applied the instruction.

Pedersen contends the trespass instruction was prejudicial because the instruction improperly communicated to the jury that a trespasser is barred as a matter of law from relying on theories of complete self-defense or imperfect self-defense. This argument is without merit because the instruction did not state or suggest this rule. In discussing the issue with counsel during the pre-instruction conference, the court agreed that Pedersen *was* entitled to assert his self-defense and imperfect self-defense theories even if the jury found he trespassed on Chartier's property. The court thus modified the model trespass instruction to add that if the lawful occupant uses force to defend himself or his property, the jury must then evaluate the amount of force used to determine whether defendant's actions were "justified as self-defense or imperfect" self-defense, and expressly referred the jury to the instructions defining these theories (CALCRIM Nos. 505 and 571).

Under these instructions, if the jury found Pedersen to be a trespasser who was asked to leave the property, the trespass instruction merely provided the jury guidance on how to evaluate *Chartier's actions* in threatening Pedersen with the wooden club and jumping over the fence to chase him. It did not bar the jury from considering Pedersen's testimony that he shot Chartier because Chartier was acting unreasonably by charging at him and threatening him with the wooden object. The trespass instruction was consistent with the self-defense instructions that informed the jury of the relevant factors in

considering whether Pedersen had an actual and/or reasonable belief that Chartier was acting with unreasonable and deadly force. (See fns. 1, 2, above.) There is nothing in the trespass instruction that would have improperly affected the jury's evaluation of the evidence as to whether Pedersen had an actual and/or reasonable belief in the need to use deadly force to defend against an alleged deadly attack.

Pedersen relies on portions of the prosecutor's closing arguments in which he suggested that if Pedersen was a trespasser he forfeited *any* self-defense rights. To the extent these statements did not accurately reflect applicable law, the prosecutor made additional statements that correctly advised the jury that Pedersen retained his self-defense rights if the jury found Chartier used or threatened unreasonable force under the circumstances. Moreover, defense counsel did not raise any objections to the prosecutor's challenged statements, and thus the contention is forfeited on appeal. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1339 (*Seumanu*).) Pedersen does not contend that these arguments constituted prosecutorial misconduct independently supporting a reversal of the case.

Viewing the entire record, we are satisfied the prosecutor's statements would not have misled the jury as to the meaning of the given trespasser instruction. Moreover, even if the prosecutor mischaracterized the instruction, the court told the jury it should follow only the court's instructions, and should disregard any statements by counsel that are inconsistent with those instructions. We are required to presume the jurors understood and followed this instruction. (*People v. Hinton* (2006) 37 Cal.4th 839, 871; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*).)

B. *CALCRIM No. 3471: Initial Aggressor Instruction*

Pedersen next challenges the court's instruction pertaining to a defendant's rights to assert self-defense when the defendant was the initial aggressor in the conflict ("Initial Aggressor" instruction). (CALCRIM No. 3471.)

The model instruction (CALJIC No. 3471) pertains to two categories of individuals: (1) a defendant who starts a fight; and (2) a defendant who agreed in advance to engage in mutual combat. (CALCRIM No. 3471.) The instruction states that if a defendant comes within either category, the defendant cannot rely on self-defense unless the defendant attempted to stop fighting and communicated this desire to the opponent. (*Ibid.*) The instruction also includes an exception in situations where a defendant used only nondeadly force but the opponent escalated with deadly force. (*Ibid.*)

The court gave a modified version of this instruction. The written instruction stated:

> "3471. Right to Self-Defense: Mutual Combat or Initial Aggressor
>
> "A person who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tries to stop fighting; [¶] AND [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting.
>
> "If the defendant meets these requirements, he then had a right to self-defense if the opponent continues to fight.
>
> "However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to

> try to stop fighting or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting."

This instruction is essentially identical to the CALCRIM model instruction, except the court deleted all mention of mutual combat (other than in the title). (See CALCRIM No. 3471.) The court did not read the title when orally instructing the jury.

In his opening brief, Pedersen argues this instruction was erroneous because there was no evidence he and Chartier engaged in "mutual combat." In his respondent's brief, the Attorney General noted that the court removed the " 'mutual combat' " language from the body of the instruction, and instructed only on the self-defense rights of a defendant who is "an initial aggressor."

In his reply brief, Pederson's counsel acknowledged he inadvertently missed this point in asserting his argument in the opening brief. But he contends the jury may have thought the mutual-combat concept applies because the court and parties left the phrase in the title of the written instructions. This argument is without merit. The body of the instruction explained the manner in which the jury should interpret the events if it found Pederson was the initial aggressor. This language cannot be reasonably interpreted to suggest that Pedersen engaged in mutual combat. The instruction was a proper statement of the law as applied to the facts, and substantial evidence supported the giving of the instruction. Pedersen does not challenge that he could be considered the initial aggressor in the incident.

Pedersen argues alternatively that there was prejudicial error because the prosecutor twice referred to "mutual combat" in his closing argument. However,

Pedersen forfeited this challenge by failing to object to these references during the argument. (*Seumanu*, *supra*, 61 Cal.4th at p. 1339.) Moreover, he does not raise the "mutual combat" references as a separate ground for error on appeal. Further, there is no basis to find the prosecutor's brief references would have misled or confused the jury.

C. *CALCRIM No. 3472: Contrived Self-defense*

Pedersen next challenges a related instruction regarding an initial aggressor's self-defense rights in a very specific situation: when the defendant provoked a fight for the purpose of triggering the victim to fight back that would give the defendant grounds to meet this force with additional force. Pedersen contends the court erred by failing to modify the instruction to add an exception for the defendant's use of nondeadly force. The argument is unavailing.

The challenged instruction—titled "Right to Self-Defense: May Not be Contrived"—was identical to the model CALCRIM No. 3472 instruction. It read: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

The instruction applies to a subset of crimes when the defendant was the initial aggressor *and* the defendant started the fight with a specific forbidden purpose: "to create an excuse to use force." (CALCRIM No. 3472; see *People v. Ramirez* (2015) 233 Cal.App.4th 940, 955 (*Ramirez*); see also *People v. Hinshaw* (1924) 194 Cal. 1, 26.) The instruction tells the jury that self-defense is not available if the defendant sought to quarrel with the specific intent to compel the victim to use force, and through this

contrivance, to create a real or apparent necessity to use stronger force against the victim. (See *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333 (*Eulian*).)

The instruction accurately reflects governing law. (*Eulian, supra,* 247 Cal.App.4th at pp. 1333-1334; see *Ramirez, supra,* 233 Cal.App.4th at p. 947; see also *People v. Enraca* (2012) 53 Cal.4th 735, 761-762.) And it is undisputed there was substantial evidence to support the giving of the instruction in this case. The prosecutor's theory was that Pedersen had planned the murder by going to Chartier's home with the purpose of provoking him to attack Pedersen, thereby giving Pedersen the opportunity to kill Chartier and avoid criminal consequences by claiming self-defense. That theory was supported by the history of confrontations between the two men, the text messages between Jennifer and Pedersen, and the circumstances occurring immediately before the fatal shooting.

Pedersen contends the court nonetheless erred in giving the instruction because the court did not sua sponte add an exception that if the defendant sought to provoke *only a nondeadly response,* a defendant does not forfeit a self-defense claim *if the victim responded with deadly force against the defendant.*

Pedersen asserts this contention even though the court instructed the jury on this precise principle in connection with the related Initial Aggressor instruction, which included a statement: "[I]f the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting or communicate the desire to stop to the opponent, or

give the opponent a chance to stop fighting." In light of this specific instruction, the court was not required to repeat this language with CALCRIM No. 3472. The instructions must be examined as a whole and we must presume the jury correlated the instructions. (*People v. Houston* (2012) 54 Cal.4th 1186, 1229-1230; *Sanchez, supra,* 26 Cal.4th at p. 852.)

In challenging this conclusion, Pedersen relies on *Ramirez, supra,* 233 Cal.App.4th 940, in which a divided panel concluded that *under the facts of that case*, CALCRIM No. 3472 misstated the law by effectively advising the jury "that one who provokes a fistfight forfeits the right of self-defense if the adversary resorts to deadly force." (*Ramirez*, at p. 947.) In *Ramirez*, there was evidence the defendant (a gang member) intended to confront rival gang members by engaging only in a fistfight, but when he saw one of the rival gang members holding an item that looked like a gun, the defendant pulled his gun from his pocket and fatally shot the rival gang member. (*Id.* at pp. 944-945.) The majority reversed the first degree murder verdict, finding the contrived self-defense instruction was improper because it "made no allowance for an intent to use only nondeadly force and an adversary's sudden escalation to deadly violence." (*Id.* at p. 945.) The court reasoned that "[a] person who contrives to start a fistfight or provoke a nondeadly quarrel does not thereby 'forfeit[] . . . his right to live.' " (*Id.* at p. 943.) In finding error, the court discussed the prosecutor's repeated arguments that the contrived self-defense instruction meant that the defendant had no self-defense right if he provoked the fight or quarrel, even if he intended only to engage in a fistfight. (*Id.* at pp. 946-947, 948, 950.)

In his dissent, Justice Richard Fybel said a reasonable juror would not have interpreted CALCRIM No. 3472 in such a manner, particularly because the instruction applies only in a narrow set of circumstances when the defendant provokes the fight for the purpose of triggering the defendant to use force, and the trial court specifically instructed the jury in the Initial Aggressor instruction that a defendant who intends only nondeadly force retains a self-defense right if the victim responds with deadly force. (*Ramirez*, *supra*, 233 Cal.App.4th at pp. 954-957.)

The added admonition was unnecessary here. At most, the exception applies only where a jury could conclude that the defendant was an initial aggressor *who specifically intended to create an excuse to use force, but only intended a fistfight (or other nondeadly encounter*). The facts here do not support this theory. If the jury were to believe that Pedersen initiated the fight with Chartier to provoke Chartier into attacking him so that he could justify his use of force against Chartier, the only reasonable conclusion is that Pedersen intended to use deadly force. Pedersen admits he knew that Chartier regularly carried deadly weapons and had threatened his life on numerous occasions. Pedersen brought a gun to the encounter. Thus, if the jury were to believe that Pedersen went to Chartier's home for the purpose of provoking Chartier to use force against him (a predicate for the contrived self-defense instruction), the jury would not have found that Pedersen intended only to have a fistfight or other nondeadly encounter with Chartier. Additionally, unlike *Ramirez*, the prosecutor made no statements suggesting that CALCRIM No. 3472 applies even if Pedersen intended to provoke Chartier but engage only in a nondeadly conflict.

Pedersen's reliance on *People v. Vasquez* (2006) 136 Cal.App.4th 1176 is misplaced. In *Vasquez,* the trial court refused to instruct on imperfect self-defense because it found that the defendant (a man in a wheelchair who was holding a gun) did not believe he was in imminent peril from the victim's attack and the defendant had created the need to defend himself by luring the victim to an alley to confront him. (*Id.* at pp. 1178-1179.) The Court of Appeal reversed, determining the court erred in failing to give the imperfect self-defense instruction. (*Id.* at pp. 1178-1180.) This case is different. The court here instructed on imperfect self-defense, including the circumstances under which a defendant may successfully claim self-defense if he or she initiated the fight and/or if the victim's response was unreasonable.

Finally, because the jury found the prosecutor did not meet its burden to prove premeditated murder based on a theory that Pedersen had contrived Chartier's use of force to create the necessity for Pedersen to kill Chartier, there is no likelihood the jury used the contrived self-defense instruction in a manner that would have been prejudicial to Pedersen.

III. *Claimed Errors on Voluntary Manslaughter Instructions*

Pedersen contends the court erred in instructing the jury on imperfect self-defense and heat of passion (CALCRIM Nos. 570, 571) and on the need for a concurrence of act and intent (CALCRIM No. 252) because the jury could have inferred from these instructions that voluntary manslaughter requires a specific intent to kill. Pedersen argues these instructions likely confused the jury to believe it was precluded from finding

him guilty of voluntary manslaughter if he fatally shot Chartier without the specific intent to kill (and instead killed him only with the conscious disregard for his life).

There was no prejudicial error. The court correctly instructed on imperfect self-defense and heat of passion, and the claimed incomplete language used in CALCRIM No. 252 would not have misled the jury to believe it could not find voluntary manslaughter if it found Pedersen fatally shot Chartier without the specific intent to kill but with conscious disregard for Chartier's life.

A. *CALCRIM Nos. 570 and 571*

After instructing the jury on the elements of first and second degree murder (see CALCRIM Nos. 520, 521), the court instructed the jury that "[a] killing that would otherwise be murder is reduced to Voluntary Manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion" or the defendant "acted in imperfect self-defense."[4] (See CALCRIM Nos. 570, 571.) Pedersen contends these instructions "are infirm in that . . . they do not include a reference to conscious disregard for human life as a basis for a voluntary manslaughter finding." Pedersen says these instructions should have included a statement that a killing can be voluntary manslaughter whether the killing was intentional or in conscious disregard of life.

Pedersen is correct that an intentional killing or a killing with conscious disregard for life can support a voluntary manslaughter verdict if all other elements are met. (See *Lasko, supra,* 23 Cal.4th at pp. 104, 108-110; *People v. Blakeley* (2000) 23 Cal.4th 82,

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4 The given imperfect self-defense instruction is set forth in footnote 1, above.

84, 87-91; *People v. Genovese* (2008) 168 Cal.App.4th 817, 831-832 (*Genovese*).) But we reject Pedersen's contention that the challenged manslaughter instructions were deficient because they did not explicitly identify this concept within the four corners of the instructions. In the given instructions, the court told the jury: "A killing that *would otherwise be murder is reduced* to Voluntary Manslaughter if the defendant killed a person because he acted in imperfect self-defense" and "A killing that *would otherwise be murder is reduced* to Voluntary Manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." (Italics added.) The court also expressly instructed the jury that a murder can be committed with the intent to kill or conscious disregard for life.

These instructions communicated to the jury that manslaughter is a crime that is committed if certain elements of murder are negated, i.e., a crime that would "*otherwise be murder*" is "*reduced*" to voluntary manslaughter if it is committed after reasonable provocation or in imperfect self-defense. (Italics added.) Based on these murder and manslaughter instructions, the court did not need to repeat the concept that a voluntary manslaughter can be committed with intent to kill *or* conscious disregard for the victim's life. The killing could not "otherwise be murder" unless the jury found defendant intended to kill the victim or acted with conscious disregard for human life. The jury was explicitly informed of this concept in the instruction defining murder (i.e., that to prove murder, the prosecution must prove defendant acted with one of the two kinds of malice aforethought—express, which requires intent to kill, or implied, which requires conscious disregard for human life).

The jury was properly instructed that a killing in imperfect self-defense or heat of passion (that would otherwise be murder) is voluntary manslaughter, whether the killing was intentional or in conscious disregard for life. Pedersen contends this conclusion would "imput[e] to juries . . . a legal parsing ability that borders on the incredulous." The opposite is true. Pedersen's technical reading of the voluntary manslaughter instructions is not based on commonsense or reasoned logic. No reasonable jury would have interpreted the voluntary manslaughter instructions to mean it could not return a voluntary manslaughter verdict if it found Pedersen committed the murder as a result of reasonable provocation or imperfect self-defense, merely because it found he acted with the conscious disregard for Chartier's life, *rather than with the specific intent to kill*.

This is the same conclusion reached by a Court of Appeal more than 10 years ago in *Genovese*, *supra*, 168 Cal.App.4th 817. We agree with *Genovese*'s reasoning and determination on this issue. (*Id.* at pp. 831-832.)

B. *CALCRIM No. 252*

Pedersen contends the jury's confusion would have been compounded because the court told the jury that voluntary manslaughter is a specific intent crime as part of the modified concurrence instruction. (CALCRIM No. 252.) Using a modified version of CALCRIM No. 252, the court instructed the jury in relevant part:

> "The [charged] crime and allegation . . . requires proof of the union, or joint operation, of act and wrongful intent. [¶] The crimes of Murder in the First or Second Degree require a specific intent and mental state. For you to find a person guilty of either of these crimes, that person must not only intentionally commit the prohibited act, but must do so with a specific intent and mental state. The act and the specific intent and mental state required are explained in the

> instruction for that crime. [¶] *The lesser crime of Voluntary Manslaughter requires a specific intent. For you to find a person guilty of this crime, that person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime.*" (Italics added.)

Even assuming the court should have added in this instruction that voluntary manslaughter can be committed either with the specific intent to kill *or* with the conscious disregard for human life (which some courts have viewed as a general intent crime), there was no prejudicial error under either the *Watson* or *Chapman* standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *Watson*, *supra*, 46 Cal.2d at p. 837; *People v. Martinez* (2007) 154 Cal.App.4th 314, 337 (*Martinez*).)

The court properly instructed the jury on murder, express and implied malice, and voluntary manslaughter under heat of passion and imperfect self-defense theories. The court told the jury that to prove murder the prosecution had the burden to prove beyond a reasonable doubt that Pedersen did not kill Chartier in the heat of passion or imperfect self-defense. In light of these instructions explaining the concept that a murder *reduces* to voluntary manslaughter based on certain specified circumstances, there is no reasonable possibility the jury believed that it needed to additionally find that defendant had a specific intent to kill (rather than acted with a conscious disregard for life) before it could find the murder reduced to voluntary manslaughter. The given concurrence instruction would not have created any jury confusion on this issue.

Additionally, there is no basis to find the jury would have concluded that Pederson acted solely with conscious disregard for Chartier's life, and not also acted with the

specific intent to kill. Armed with a loaded gun, Pedersen went to the residence of his adversary (Chartier) and yelled until Chartier came outside. As Chartier was waving a wooden object and ran toward him, Pedersen shot him in the abdomen from close range. Pedersen testified he was scared Chartier was trying to kill him so he shot him first. Pedersen's defense was that although he intended to kill Chartier he did so with the reasonable or unreasonable (but honest) belief that he was acting in self-defense. On these facts, the jury could have found self-defense or imperfect self-defense (if it had found the supporting facts to be true and inferences to be reasonable), but there is no possibility that it could have found Pedersen fired the bullet solely with conscious disregard for Chartier's life and not also the specific intent to kill.

Pederson's reliance on *Martinez, supra,* 154 Cal.App.4th 314 is misplaced. In *Martinez* the defendant killed the victim during a fight, and was convicted of second degree murder. (*Id.* at p. 317.) On appeal, the defendant argued primarily that the given concurrence instruction was improper because it did not properly define the " 'conscious disregard' " standard. (*Id.* at p. 334.) The reviewing court rejected the argument, and observed that the instruction made clear that either specific intent or conscious disregard for life was sufficient to support voluntary manslaughter. The *Martinez* court *also* stated that even if the instruction could be construed as *requiring* the jury to find a specific intent to kill for manslaughter, the failure to properly instruct the jury was not prejudicial error. (*Id.* at p. 337.) In support, the court observed that the trial court properly instructed the jury on the elements of murder and voluntary manslaughter, and thus it was unlikely the jury would have decided differently if the challenged language had not been

used in the concurrence instruction. (*Ibid.*) We have reached a similar conclusion in this case.

DISPOSITION

The judgment is affirmed.

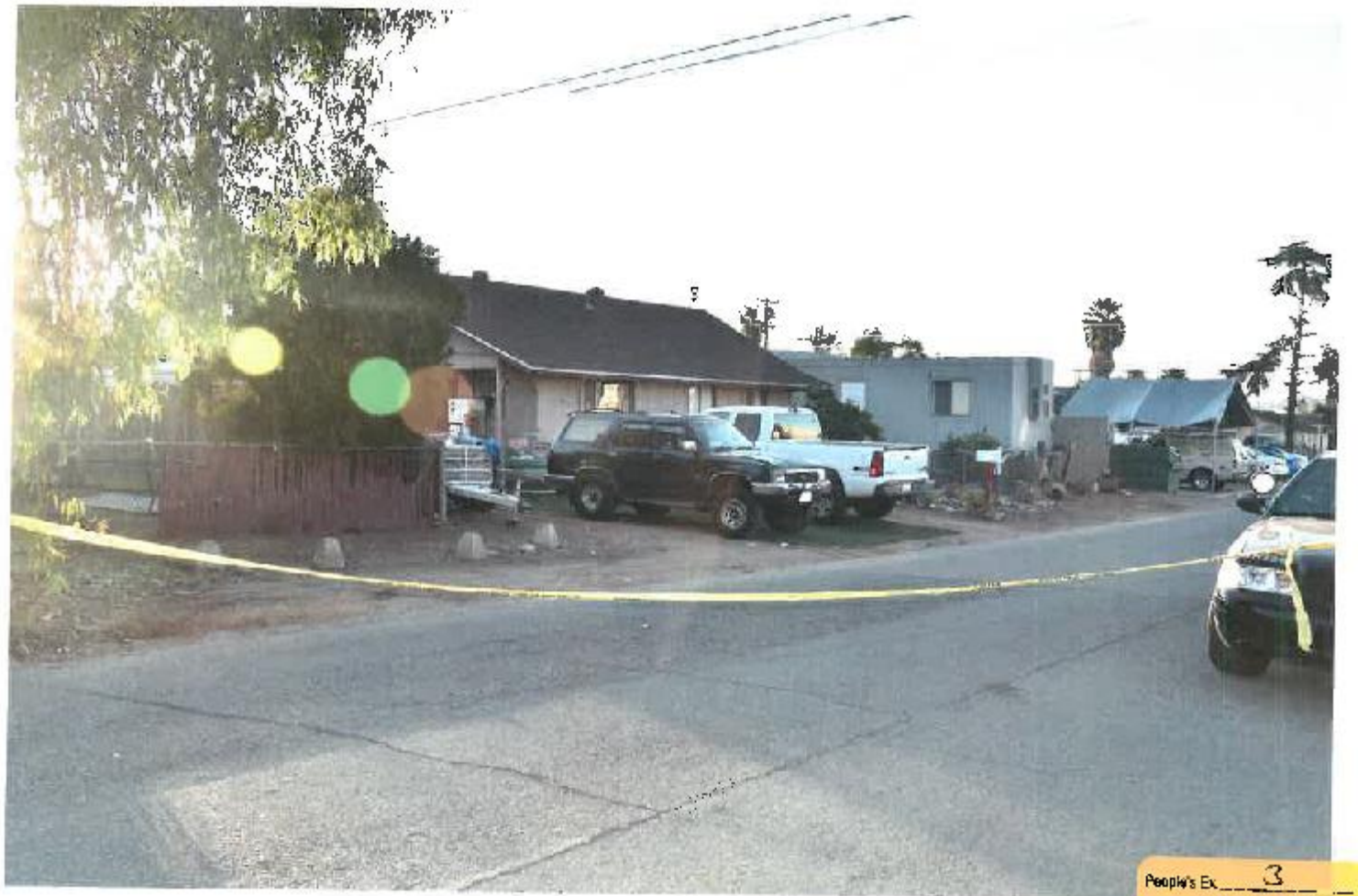
HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.

EXHIBITS



People's Ex. 3
Case # SCE365343
Rec'd. 9-13-17
Dept. 17 Clk. NS

People's Ex. 5
Case # SCE385343
Rec'd. 9-13-17
Dept. 17 Ck. NS

People's Ex. 15
Case # SCE365343
Rec'd 9-13-17
Dept. 17 Ok NS